

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Michael Lee Kramer,

Petitioner,

FINDINGS OF FACT,  
CONCLUSIONS OF

LAW

VS.

AND RECOMMENDATION

City of Proctor,

Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, in April 23, 1990, at 9:30 a.m. in room 407 of the Federal Building, 515 West First Street, Duluth, Minnesota 55802. William M. Burns of Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A., 1000 First Bank Place, 130 West Superior Street, Duluth, Minnesota 55802-2094, appeared on behalf of Petitioner, Michael Lee Kramer (Petitioner). Thomas F. Andrew of Brown, Andrew, Hallenbeck. Signorelli & Zallar, P.A., 300 Alworth Building, Duluth, Minnesota 55802, appeared on behalf of Respondent, City of Proctor (City). Petitioner and Daniel P. Hoffman, Proctor City Administrator, testified at the hearing. On May 10, 1990, the Administrative Law Judge asked the parties to submit argument on the issue of whether Petitioner's position had been abolished in good faith, an issue that had not been raised or argued previously. The record was closed upon receipt of the last submission on May 23, 1990.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact William J. Gregg, the Department of Veterans Affairs, 2nd Floor,

Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota  
55155, to  
ascertain the procedure for filing exceptions and presenting argument.

STATEMENT OF ISSUES

1. Whether Petitioner was a department head so as to be excluded  
from  
the veterans preference protections of Minn. Stat. 197.46.

2. Whether Petitioner's position was abolished in good faith.

Based upon the record herein, the Administrative Law Judge makes the following:

#### FINDINGS-OF FACT

1. Petitioner is a veteran for the purposes of Minn. Stat. 197.46, having served on active duty in the U.S. Air Force from September 1965 through January 1969, and having received an honorable discharge.

2. After leaving the Air Force, Petitioner worked for 16 years as a super market manager for a company at two stores the company owned in Proctor and Duluth.

3. For many years, the City had operated a small liquor store in downtown Proctor known as the "Rail Line Store". Since 1977, the manager of that store had been Dale Akeson. Akeson is also a veteran. From at least 1981 through 1985, Akeson reported to a liquor committee appointed by the Proctor City Council (Council) which consisted of a number of citizens and one member of the Council. The committee reported to the Council. In 1985, the City built a new liquor store along Interstate 35 at the exit that serves the Spirit Mountain ski area to take advantage of the traffic at that location. This store is referred to as the South Proctor Store or the Mountain Spirits Store. The Mountain Spirits Store was considerably larger than the Rail Line Store and equipped with modern coolers and other state-of-the-art fixtures the Rail Line Store did not have.

4. The City intended to hire a manager of the Mountain Spirits Store a few months before the store opened. It was intended by the City that the manager of the new store would also have authority over the Rail Line Store. Akeson was not interested in being the manager of the Mountain Spirits Store because he did not want the higher level of responsibility.

5. Petitioner applied for the new liquor manager position on September 5, 1985, stating on his application that his particular qualifications for the position were, "16 years experience in all facets of retail management." Ex. 1.

6. On September 25, 1985, the Council met to consider the applications for the position of "Liquor Store Manager for the south Proctor store." Following a discussion, the following motion passed:

To hire Michael Kramer as Liquor Manager effective October 1, 1985, at an annual salary of \$24,000 with one years probationary period and including a performance review after six months.

Ex . 7 .

7. For the next 4 years, Petitioner was the manager of the Mountain Spirit Store and Akeson was the manager of the Rail Line Store. Petitioner

also exercised general supervisory authority over Akeson and the Rail Line Store operation. On January 2, 1990, the Council decided to close the Rail Line Store because of financial losses in the City's liquor operations. On

January 9, 1990, the Council decided to retain Akeson to run the remaining store and lay off Petitioner because Akeson had greater seniority and the "least cost impact on the financial statement." Ex. 7.

8. No job descriptions were ever formally adopted by the City Administrator or the City Council for the positions held by Petitioner and Akeson. Even their job titles were not settled. When he was hired in 1985, the council minutes referred to Petitioner both as the "Liquor Store Manager for the south Proctor store" and as the "Liquor Manager". December 28, 1988, Council minutes refer to a wage and vacation day agreement with the two men as "The Liquor Store Manager and Store Supervisor Agreement." The minutes of a January 2, 1990, Council meeting refer to the two men as the "Liquor Managers". Likewise, on January 9, 1990, the Council minutes refer to the two "manager positions". Ex. 7.

9. In 1988, Petitioner suggested to the City Administrator that it would be a good idea to have job descriptions describing Petitioner's position and Akeson's position. The City Administrator agreed that that would be a good idea and asked Petitioner to do that. Petitioner prepared two job descriptions, one which he entitled Liquor Store Manager - Off Sale, and the other which he entitled Assistant Liquor Store Manager - Off Sale. Ex. 2 and 3. With some exceptions, the job descriptions described the duties that were then being performed by Petitioner and Akeson, respectively. These job descriptions also contained some items that Petitioner was recommending but which were not included in the existing duties and responsibilities of the two men.

10. Petitioner and Akeson were the only full-time employees at the liquor stores. Each store also employed three or four part-time sales clerks. Normally only one person was on duty in each of the stores at any one time except at those times when Petitioner was at the Rail Line Store talking with Akeson or performing other duties there.

11. At all times relevant here, there has been a labor agreement between the City of Proctor Municipal Liquor Stores and the United Food and Commercial Workers' Union Local No. 1116 (the Labor Agreement). At the time he was hired by the City, Petitioner wanted to be sure that he would be covered by the Labor Agreement with that union so that his union pension benefits would continue. The Labor Agreement defines the employer as the "City of Proctor, Proctor, Minnesota, Municipal Liquor Stores." The Labor Agreement covers all

full-time and regular part-time employees of the employer who sell liquor. Regular part-time employees are defined as those who work less than forty hours per week but more than fourteen hours per week or sixty-seven days per year. Ex. 8, Article III. Petitioner and Akeson were the only members of the bargaining unit, but at one time, one part-time employee who worked substantial hours was covered by the Labor Agreement. Article IV of the Labor Agreement provides for seniority and states that all employees under the jurisdiction of the union shall be hired, retained, promoted, demoted, laid off, discharged, or rehired according to their seniority in the employment of the employer. It also provides:

The working manager and assistant manager, as designated by the Employer, shall be a member of the Union, and, as provided for in this Agreement, shall have super seniority.

No provision of the Agreement appears to deal with "super seniority." The Labor Agreement provides for vacation and other benefits for all employees, specifies hours of work and specifies minimum scale of wages for clerks, but not for the managers. The Labor Agreement incorporates the terms of a health and welfare plan that provides pension and other benefits to union members.

12. Petitioner was in charge of the operation of both liquor stores, which is generally referred to in this report as the City's Liquor Operation. The general nature of his work was to manage and direct the Liquor Operation in accordance with the objectives and general guidelines established by the City Administrator and Council. He was responsible for supervising Akeson and the part-time liquor clerks, planning operations, purchasing, pricing and merchandising stock, and responsible for inventorying and record keeping, all with the overall objective of driving maximum profit for the City from the liquor operation.

13. Petitioner generally worked at the Mountain Spirit Store and was responsible for its operation. Akeson was responsible for the operation of the Rail Line Store and performed such functions as acting as sales clerk, inventorying merchandise and ordering necessary stock, receiving and restocking the merchandise, supervising the store clerks, displaying the merchandise and arranging store displays and evaluating and recommending changes in the lines of merchandise offered. Akeson performed his duties, subject to the supervision of Petitioner and subject to Petitioner's decision as to such matters as the product lines and inventory amounts to be carried and the manner of display of the merchandise. On at least two occasions Akeson suggested that the Rail Line Store should carry less of the upscale products the Mountain Spirits Store carried because of the difference in clientele, but Petitioner disagreed and did not allow the change.

14. When Petitioner was hired, Akeson continued at his existing salary. Petitioner was paid substantially more than Akeson throughout his employment. For example, during 1988, Petitioner was paid \$2,239 per month and Akeson was paid \$1,782 per month. In 1989, Petitioner was paid \$2,306 per month and Akeson \$1,825 per month. Ex. 7.

15. Petitioner reported to the City Administrator, who, in turn reported to the Council. The City Administrator had no particular experience or expertise regarding the operation of liquor stores or retail operations in general. The City Administrator and the Council relied upon Petitioner to manage the Liquor Operation for the City. Petitioner rarely attended Council meetings and only did so when he was asked to appear. He attended two or three Council meetings during his tenure.

16. Petitioner had no technical or professional training for his position with the City, but did have 16 years of retail grocery store experience prior to being employed. While in the City's employ, he became a member and ultimately a director of the Minnesota Municipal Beverage Association. In that organization, he attended meetings and seminars on the laws affecting liquor store operations, merchandising techniques and lobbying efforts by the association. He shared some of his ideas on the things he learned with the City Administrator and with Akeson.

17. The Council ultimately approve all hiring and firing of City employees. In practice, Petitioner hired part-time employees subject to approval by the Council. He generally got applicants from the pool of persons who had filed applications for part-time work with the City. Sometimes Petitioner notified the City Administrator and the Council before the person started work and sometimes he did not. In a few cases, Petitioner hired people without any notice to the City Administrator or Council who didn't learn of the hiring until the first pay check report appeared. Akeson recommended the hiring and firing of part-time employees at the Rail Line Store to Petitioner, who would approve or disapprove the action. Whenever Akeson had a vacancy he would call Petitioner. Again, such actions were technically subject to approval by the Council, but, in fact, such approval was sometimes not sought by Petitioner. The Council never reversed any such employment decision made by Petitioner. On occasion, employees working at the liquor stores were transferred to other City departments by the City Administrator.

18. Petitioner never met with the Council to review the budget for the Liquor Operation. He provided his financial data to the City Administrator, who, along with the City Accountant, prepared financial statements and incorporated the data into the City budget.

19. The other major divisions of the City reporting to the City Administrator were the Police Department, the Street Maintenance Department, the Building Official and the Public Utilities Department. As with those divisions, the City Administrator would consult with Petitioner regarding the Liquor Operation. The City Administrator would meet with Petitioner on an occasional basis, sometimes it was several weeks between meetings and sometimes they met several times a week concerning the Liquor Operation.

20. Petitioner established the staffing levels at the liquor stores and set the work schedules.

21. The Liquor Operation had last shown a profit in 1985. In 1986 and thereafter, it lost money. In 1988, the Liquor Fund retained earnings became negative. In 1989, the State Auditor pointed out the annual losses that had been occurring and recommended that the City look at significant changes to enhance the Liquor Fund's financial status. The City began to look at ways to reduce costs in the Liquor Operation. On January 2, 1990, the Council met to consider the need to reduce costs in the Liquor Operation and asked Petitioner and Akeson to attend. After considerable discussion, the Council passed the following resolution:

That in view of the need to consolidate liquor sales in the City of Proctor in order to reduce expenses, to discontinue the Rail Line Liquor Store outlet at the earliest possible date.

Ex . 7 .

22. On January 9, 1990, a special meeting of the Council was held to consider staffing of the remaining liquor store. The City Administrator and the City Accountant attended the meeting and made presentations regarding

different staffing scenarios and the projected incomes from each. Petitioner and Akeson were not invited and were not present at the meeting.

23. The six scenarios presented involved various combinations of retaining Petitioner or Akesson or both, different sales hours, and projecting sales at the 1989 level or at the 1989 level plus an increase of part of the 1989 sales at the Rail Line Store. Ex. 4. The Council decided that the City would not be able to retain both managers without a considerable increase in sales, which was contrary to recent trends. Ultimately, the following motion was passed:

To approve the liquor fund reorganization plan as presented to the Council and retain the manager with the greater seniority and least cost impact on the financial statement.

Ex. 7. Akesson had the greater seniority and, because of his lower salary, the least cost impact. Ex. 4.

24- On January 10, 1990, the City Administrator informed Petitioner of the Council's decision to only retain one manager due to the financial considerations and to retain Akesson because of his seniority and lesser cost. At Petitioner's request, the City Administrator prepared a letter to Petitioner explaining the reason the City was terminating him. The letter stated that because of declining liquor sales and the adverse financial impact on the liquor operation, the Council had found it necessary to close the Rail Line Store and to focus all sales efforts on one facility. It stated that they now had two managers for one outlet and had to decide to eliminate one of the positions. The letter stated that the decision was not based upon ability or any performance related measure, but upon two criteria: First, in an effort to reduce costs as much as possible, they retained the lower paid manager. Second, "and more importantly," they retained the manager with the greater seniority. The letter did not notify Petitioner that he had any rights as a veteran to request a hearing, nor did it mention any other appeal rights. Ex. 5.

25. Petitioner requested that the City Administrator also prepare a letter of recommendation for his use and, in particular, one that did not mention the financial losses of the liquor operation. The City Administrator prepared such a letter. Ex. 6.

26. On or about February 15, 1990, Petitioner filed a Petition with the Commissioner of Veterans Affairs claiming that the City had denied him his veterans rights. In the Petition, Petitioner stated, in part:

I was hired General Manager of Liquor Operations over two (2) municipal liquor stores for the City of Proctor, Minnesota, on October 1, 1985 to February 9, 1990. My position was taken away and given to another employee, an assistant manager, with more seniority but less responsibility. As of January 10, I received a letter stating my dismissal, but the letter does not suggest my right to a hearing.

In the Petition, Petitioner requested, "a hearing for reinstatement because my duties were not eliminated, but given to my assistant." He also requested full back pay and benefits to February 9, 1990.

27. On February 28, 1990, the Commissioner of Veterans Affairs served the Notice of Petition and Order for Hearing upon Petitioner and the City Administrator.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481. The Notice of Hearing issued by the Department of Veterans Affairs was proper and all substantive and procedural requirements of law and rule have been fulfilled.

2. Petitioner is a veteran within the meaning of Minn. Stat. 197.447 and for the purposes of Minn. Stat. 197.46.

3. During his employment with the City, Petitioner was the manager of the City's Liquor Operation, having control and responsibility over both of the City's liquor stores.

4. Petitioner was not a department head for the purposes of Minn. Stat. 197.46.

5. Petitioner was removed from his position by the City when his position was eliminated. He was not removed for incompetency or misconduct.

6. The City did not notify Petitioner of his right under Minn. Stat. 197.46 to seek a writ of mandamus in district court or to file a petition with the Commissioner of Veterans Affairs for a determination of whether his position had been abolished in good faith. That failure is inconsequential because Petitioner has filed a petition with the Commissioner of Veterans Affairs.

7. The question of whether Petitioner's position had been abolished in good faith is properly before the Administrative Law Judge and the Commissioner of Veterans Affairs.

8. The City abolished Petitioner's position in good faith.

9. Petitioner's veterans preference rights were not denied by the City when it abolished his position.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:



#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs deny the Petition of Michael Lee Kramer in this matter.

Dated this 4th day of May, 1990.

STEVE M. MIHALCHICK  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, not transcribed.  
Tape Nos. 8895, 8858 and 8857.

#### MEMORANDUM

Department Head Status

The Veterans Preference Act provides that honorably discharged veterans may not be removed from employment with a political subdivision without first having the benefit of a hearing. Minn. Stat. 197.46. The statute is expressly inapplicable to the chief deputy of an elected official or a department head and this exemption has been construed to include the head of a department as well as his or her chief deputy. The burden to establish that a veteran is the head of a department is on the political subdivision. *Holmes v. Wabasha County*, 402 N.W.2d 643 (Minn. App. 1987).

The "head of a department" means the head of some government division "which was important enough to have a deputy," and "only such departments Ecan] be excluded as a separate department." *State ex rel. Sprague v. Heise*, 243 Minn. 367, 373, 67 N.W.2d 907, 912 (1954).

The Minnesota Supreme Court has itemized the various factors used in several cases to determine whether certain veterans were department heads:

1. Does the alleged department head have charge of the work done by his department?
2. Does his work require technical, professional training?
3. Is he the highest authority at that level of government as to his official duties?



4. Does he supervise all the work in his department?
5. Does the success of his department depend on his technique?
6. Are the employees in the department under his direction?
7. Are his duties more than merely different from other employees?  
Does he have the power to hire and fire subordinates?

State ex. rel McGinnis v. Police Civil Service Commission of Golden Valley  
253 Minn. 62, 75, 91 N.W.2d 154, 163 (1958).

There are really two positions to consider in this matter: Petitioner's position as manager of liquor operations during most of his employment and Petitioner's position as one of two liquor store managers after the Rail Line Store had been closed. Starting with the latter first, after the City had decided to close the Rail Line Liquor Store on January 2, 1990, and had decided that they could not afford to retain both Petitioner and Akeson on January 9, 1990, the City had already eliminated the manager of liquor operations position and considered both men as liquor store managers, either of whom could perform the remaining liquor store manager position. At that point, Petitioner was considered by the Council to be just a store manager, essentially equivalent to Akeson, so he could not have been a department head.

Prior to January 9, 1990, Petitioner had been the manager of Liquor Operations. But even that position was not "important enough" to constitute a department with a deputy and a head of a department. There were only two full-time employees in the Liquor Operation, Petitioner and Akeson. There were only six part-time sales clerks. Akeson was not a deputy to Petitioner. Thus, under the Sprague standard, the liquor operation cannot be considered a separate department for purposes of Minn. Stat. 197.46.

Examination of the McGinnis factors supports that conclusion.  
Petitioner was responsible for the work done in the liquor operation, but he was subject to the control of the City Administrator and through the Administrator, subject to the control of the City Council. Petitioner had day-to-day control of the Liquor Operation, but everything he did was subject to review and approval by the City Administrator. Petitioner rarely met with the City Council directly, but, instead, worked through the City Administrator.

Petitioner's work did not require technical or professional training. Certainly, experience and training are important in managing a successful retail operation of any sort, but for Petitioner and anyone else holding the position, all of his skills were acquired on the job and at various seminars and meetings. Such skills were neither technical nor professional and are skills that many people are able to acquire without advanced professional or technical training. This case is very similar in this aspect to Holmes v. Wabasha County, 402 N.W.2d 642 (Minn. App. 1987). There, the veteran alleged to be a department head was the head of three "departments" - Zoning, Agriculture and Civil Defense. The Court said that although the veteran "picked up" necessary skills on the job and at various seminars and meetings, such skills were neither technical nor professional, but were primarily

oriented toward familiarity with the zoning ordinance and the methods of enforcing the ordinances that were efficient and helpful to the public.

Petitioner was not the highest authority as to his official duties. As discussed above, the City Administrator had full control and authority over the Liquor Operation. Although the City Administrator had no particular training or experience in retail liquor operations, he did maintain control over the Liquor Operation, particularly with regard to financial matters and budgets. He relied on Petitioner's advice in making his decisions about the Liquor Operation, but retained overall control, subject to the Council's authority.

Petitioner did supervise all the work done in the Liquor Operation and the employees in the Liquor Operation were under his direction.

The success of the Liquor Operation did depend on Petitioner's technique because he was in charge of the advertising, product selection, product pricing and all other marketing functions. There is some indication in the record that liquor stores in general had a difficult time from 1988 to 1990. Petitioner asked that his letter of recommendation not reflect the financial losses that the liquor operation had experienced under his management and the City abided by that request in the letter of recommendation prepared by the City Administrator. Despite that disavowal, his techniques were important to whatever success there was.

Petitioner's duties were not more than merely different from other employees. Petitioner could best be described as the supervisor or manager of liquor operations. He was an employee of the City, a member of an employee's union, paid and treated like a supervisory employee. He was not a "department head" with significant independence of functioning and ultimate responsibility.

Petitioner did not have the power to hire or fire employees. That power was held by the Council. Although Petitioner sometimes hired or fired employees without prior Council approval, or even without advising the City Administrator and the Council, he knew, the City Administrator knew, and the

City Council knew that all such actions were subject to disapproval by the Council.

Finally, the City did not hire Petitioner into a confidential position of trust that makes at-will discharge appropriate and of the type intended to be exempt from the Veterans Preference Act requirement that cause be proved for removal. *Gorecki v, Ramsey, County*, 437 N.W.2d 646 (Minn. 1989). Petitioner was hired on probation, meaning that when he completed probation, he could only be discharged for cause. The Labor Agreement contains a grievance procedure and at least implies that discharge after probation must be for just cause .

Considering all of the foregoing factors, Petitioner's position as manager of Liquor Operations did not constitute a "department head" within the meaning of Minn. Stat. 197.46. Therefore, his removal is subject to the provisions of that section.

Good Faith Abolition of Position

Under Minn. Stat. 197.46, a political subdivision may only discharge a veteran for incompetency or misconduct. However, our Supreme Court has

recognized that the Veterans Preference Act is not intended to prevent public employers from abolishing positions in good faith. State ex rel Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923). A lack of good faith is proved when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's duties to some other employee. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986); Muhvik v. City of Duluth, File No. C5-88-1579 (Minn. App. March 21, 1989); Schiltz v. City of Duluth, File No. C3-89-53 (Minn. App. April 24, 1990); Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989).

In Young, the Court held that the notice requirements of Minn. Stat. 197.46 require that a veteran proposed to be removed for incompetency or misconduct be notified of the right to a hearing before a veterans review board, also requires that a veteran whose position is abolished be notified of the right to petition for a Writ of Mandamus in District Court to determine whether the position was abolished in good faith. Under a Mandamus action, the hearing on the issue of good faith is to be held before the District Court. The Court in Young had also noted that since 1973, a veteran could elect to enforce his or her rights either by seeking a Writ of Mandamus in District Court or by petitioning the Veterans Affairs for an order directing the political subdivision to grant relief. However, perhaps because the Young case involved a veteran who had elected the Writ of Mandamus remedy, the Court did not discuss what notice should be given regarding the right to petition the Veterans Affairs.

In Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989), several veterans whose jobs had been reclassified petitioned the Commissioner of Veterans Affairs for relief. The veterans alleged that the reclassification constituted a demotion, which is considered a "removal" under the Veterans Preference Act, and that the reclassification was a subterfuge for a demotion. The Administrative Law Judge and the Commissioner of Veterans Affairs determined that the reclassification was a removal. The Court of Appeals reversed and the Supreme Court affirmed the Court of Appeals. While the Courts reversed the Commissioner's decision, they did not disapprove of the Commissioner addressing the "good faith" issue.

Based upon the Young and Gorecki decisions, the Administrative Law Judge concludes that the hearing and determination on whether a position has been abolished in good faith is not a matter to be heard by the veterans review boards that hear appeals of removals for incompetency or misconduct. Instead such decisions are to be made by District Court, if the veteran elects to pursue a Writ of Mandamus, or by an Administrative Law Judge and the Commissioner of Veterans Affairs, if the veteran elects to pursue a petition to the Commissioner.

In this case, the City affirmatively alleges that Petitioner was not removed for incompetency or misconduct, but as the result of the elimination of a position and the application of seniority and financial considerations.

Petitioner's Petition alleges that his position was taken away and given to another employee.

The standard of a bad faith set forth in Young was developed more fully in Gorecki as follows:

in examining the conduct of this public employer, we are guided by two separate principles. The first is that the Veterans Preference Act itself was designed to "'take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause.'" *Young v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986) (quoting *State ex rel. Boyd v. Matson*, 155 Minn. 137, 151-42, 193 N.W. 30, 32 (1923)). See also *Johnson v. Village of Cohasset*, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962) (VPA protects honorably discharged veterans from the ravages of a political spoils system). While the impact of political decisions upon a veteran's employment are minimized, the act cannot be viewed as fully restricting the government's exercise or control over its administrative affairs. See *State ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (1923). A ministerial or perfunctory act of coordinating an actual position with its appropriate classification will withstand scrutiny if based upon a reasonable exercise of administrative discretion. The second principle is one requiring this court to examine the substance of the administrative decision rather than its mere form. See *Myers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987).

437 N.W.2d 646, 650.

In this case, the City was losing money every year on its Liquor Operation. Closing the smaller, older store and concentrating efforts in the larger, newer store was a reasonable decision reached after consideration of all relevant factors. Having decided to close the Rail Line Store, the Council then did a thorough examination of the staffing needs of the remaining Mountain Spirits Store. It looked at the option of keeping both Petitioner and Akeson, which would have generated a loss from operations of over \$46,000 per year; it looked at the option of keeping just Akeson, which would have generated a loss of over \$19,000 per year; it looked at retaining just Petitioner, which would have generated losses of over \$25,000 per year; it looked at options with either of them if there were additional sales; and it looked at an option with Akeson operating the store with reduced business hours. Because Petitioner's salary was \$6,000 per year higher than Akeson's, there was that amount of difference in the various scenarios. The Council was clearly justified in concluding it could not afford to keep both managers and, absent any other factor, they were probably justified in electing to retain Akeson because of his lower salary. (It is noted, however, that the Council never asked Petitioner if he would take a reduced salary.)

In addition to the financial difference, the Council made its choice based upon the seniority of Akeson. This was not only appropriate, it was required. Under the Labor Agreement, which at the time only applied to Petitioner and Akeson, employees were to be laid off or discharged according to their seniority. Moreover, under the Veterans Preference Act, seniority has been recognized. In *Young* it was stated:



If the city merely reassigned Young's duties to non-veteran employees less senior than he,<sup>3</sup> his position is not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable in cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the act exists for such situations. Thus, veterans have a preference over non-veteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed.

3 As we stated in Boyd, "[t]he [veterans preference] act does not authorize, nor purport to authorize, the removal of a prior appointee to make a place for a soldier; and cannot reasonably be construed as abrogating the civil service rules governing tenure of office." 155 Minn. at 141, 193 N.W. at 31-32.

386 N.W.2d at 738-739. Thus, because Akeson was senior to Petitioner in employment with the City, the City was required to retain him, as opposed to Petitioner, as the manager of the remaining liquor store.

What happened can be viewed in two ways. First, when the City closed one of the liquor stores because of the financial pressures, it made the position of Manager of Liquor Operations unnecessary and eliminated Petitioner at that time. Second, when the City considered both Petitioner and Akeson for staffing of the remaining liquor store, it considered both of them as store managers capable of performing the required duties. Because two managers were an intolerable financial burden, it was necessary to cut back to only one. Under either view, the City's decisions were made in good faith because they were based upon consideration of the relevant factors of financial impact and seniority in light of the existence of a genuine need to reduce costs and improve profitability. They were not a mere subterfuge to remove Petitioner. Therefore, he was not denied his veteran's preference rights.

#### Propriety of Determining Issue of Good Faith Abolition

Petitioner argues that it is inappropriate to make a determination of whether the position was abolished in good faith where the record of the hearing did not address that issue.

Petitioner cites Minn. Stat. 14.60, subd. 2, in support of this position. That statute states that no evidence shall be considered unless it is a party of the record. The findings above are based only upon the record. In its post-hearing submission, the City submitted financial statements that had been ruled irrelevant during the hearing and for which no offer of proof was made at the time. Those statements have not been considered, although they are, no doubt, relevant to the good faith abolition issue.

The Administrative Law Judge specifically invited the parties to identify any additional fact issues that needed to be developed on this issue. Petitioner suggested that the financial statements were misleading because they included depreciation, amortized costs and "other services and charges." But these are standard accounting practices and there was concern about the liquor fund, even by the State Auditor. Petitioner also suggested that the Veteran's Preference Act requires a showing of actual inability to fund the position. That is not standard set forth in Gorecki, but even if it were, the evidence in the record shows that the determination by the City that it could not retain both managers was not unreasonable. Petitioner has not suggested that he has any evidence to the contrary that is not already in the record. As such, it is concluded that the issue should be determined on the record as it exists .

SMM